
Country Reports

Jorge Morais Carvalho & Kristin Nemeth*

Implementation of the Mortgage Credit Directive in the EU Member States

One section that we regularly feature in our journal is the section “EuCML Country Reports”. Here, we provide an overview of issues that are of importance all over Europe but where EU Member States find different solutions within their national legal orders. In the previous issues the country reports focused on the Volkswagen diesel emissions scandal in the European Union with reports from Austria, Germany, Italy, the Netherlands, Poland, Portugal and the United Kingdom.

In this issue we will start covering the so-called Mortgage Credit Directive – Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property – and its implementation in the Member States.

A mortgage credit is often the most important financial operation for an ordinary consumer and regularly the only option for the consumer to take out a loan. The topic is of utmost importance for families throughout Europe, since it also has a strong link with the fundamental right to housing. The housing market is not identical in all Member States as we have some systems mainly based on lease contracts and others where the purchase of a home associated with a mortgage credit agreement is more common. For example, the home ownership rate is 96.4 % in Romania and 55.7 % in Austria.¹

At the same time, the crisis that culminated in 2008 has shown that mortgage credit agreements can affect the stability of the financial system with significant economic and social consequences.

The Directive was approved precisely to address problems concerning both consumer protection and the stability of the financial system and it is very important at this time to understand how it was implemented in the Member States, in particular taking into account that it is a minimum harmonization directive.

Although the deadline for transposition expired on 21 March 2016, by the end of November 2016 the Directive had only been implemented in 19 of the 28 Member States (24 by the end of January 2017). Among those who have not yet implemented the Directive, we find countries that have experienced financial difficulties over the past few years, such as Cyprus, Portugal or Spain, which may not be a coincidence.

It is especially important to keep in mind to what extent the social and economic relevance of credit agreements for consumers relating to residential immovable property affects the regulation of these issues in the different Member States. Mortgage credit plays a central role in the Member States where the fundamental right to housing is preferably and regularly achieved by the purchase of a home, less so in

countries, which rather adhere to the lease-model. This question is a crucial point to consider and contributes to the understanding of how these Member States implemented the directive.

Another interesting question regards the method and technique used by the different Member States to implement the Directive. This tackles the interplay with the already implemented rules of Directive 2008/48/EC on consumer credit contracts. According to Art 2 (2) a) of Directive 2008/48/EC it “shall not apply to ... credit agreements which are secured either by a mortgage or by another comparable security commonly used in a Member State on immovable property or secured by a right related to immovable property”. Also “credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building” are excluded from the scope of application (Art 2 (2) b)). Different Member States, however,² had extended their national laws to also cover the named credit contracts, which was approved to be in accordance with the Directive’s full harmonisation character.³ Therefore, it is interesting to see how the newer and narrower Directive is technically brought in line with the already existing rules regarding consumer contracts. Talking about accessible legal norms, it is probably required that the new mortgage credit regimes in the EU Member States are much closer to the general regime of consumer credit contracts.

In addition to being a minimum harmonization directive as such (with the exception of the provisions related to the European Standardised Information Sheet and to the standard for the calculation of the annual percentage rate of charge), Directive 2014/17/EU explicitly leaves room for deviating national implementation on many issues. For example in Article 14 (6): this provision states that “Member States shall specify a time period of at least seven days during which the consumer will have sufficient time to compare offers, assess their implications and make an informed decision”. It is, however, left to the Member States whether this reflection period is technically granted before or after the conclusion of the contract, which fundamentally changes the legal characterization of the situation, by either being an obstacle to contract conclusion or granting a right of withdrawal.

* Jorge Morais Carvalho, Professor of Private Law, NOVA Faculty of Law, Lisbon, Portugal, Researcher at CEDIS – Centro de I&CD sobre Direito e Sociedade, Email: jorgemoraiscarvalho@fd.unl.pt, Website: www.jorgemoraiscarvalho.com; Kristin Nemeth, Assistant-professor at the University of Innsbruck (Austria), Department of Private Law, Innrain 52, A-6020 Innsbruck, Email: kristin.nemeth@uibk.ac.at.

1 <www.tradingeconomics.com/european-union/home-ownership-rate> accessed 12 May 2017.

2 Such as Austria or Romania.

3 Case C-602/10 Volksbank România, see V. Mak, Note [2013] euvr 37-41.

One of the fundamental aspects of the new regime is the obligation to assess the creditworthiness of the consumer. This concern is immediately visible in Article 1, which defines the subject matter of the Directive and states that it “lays down a common framework for certain aspects of the laws, regulations and administrative provisions of the Member States concerning agreements covering credit for consumers secured by a mortgage or otherwise relating to residential immovable property, including an obligation to carry out a creditworthiness assessment before granting a credit, as a basis for the development of effective underwriting standards in relation to residential immovable property in the Member States”. In fact, the practical application of this obligation depends, fundamentally, on how it is regulated and moni-

tored by Member States, in particular as far as the consequences of non-compliance is regarded. It has, however, already been argued that the strict rules of Directive 2014/17/EU will eventually prevent consumers with an “average income” from being creditworthy.⁴

In this issue we start with a first series of Country Reports on the implementation of the Mortgage Credit Directive in Greece, Hungary and Spain. Further reports from other Member States (including France, Germany and the Netherlands) will be presented in the next issues. ■

4 <www.sueddeutsche.de/wirtschaft/eu-regulierung-die-neue-immobilienkredit-richtlinie-hilft-niemandem-1.2996443> accessed 16 May 2017.

Esther Arroyo Amayuelas*

Mortgage credit in Spain

I. Overview of the housing market

In Spain there are no protected tenancies or caps on the amount of rent that can be agreed in leases. Social housing is in short supply, and access to home ownership, moreover, fosters a perception of greater social integration and stability among individuals and families. The combination of these factors and the enormous profits yielded by the building sector explains why Spanish banks increased their mortgage credit supply in the years before the housing bubble burst, not only targeting people who did not actually need to buy but, more to the point, those who could not afford the credit because they were not creditworthy. According to Trading Economics data, between 2007 and 2015 the average home ownership rate in Spain was 79.28 %, ¹ with mortgage approvals averaging at 57,402.82 units between 2003 and 2016. This figure peaked at 129,128 mortgages in September 2005 before the recession hit, while the lowest figure of just 12,146 mortgages was registered in August 2013 at the height of the crisis.² According to the latest Eurostat data, in 2015 47 % of homes owned had no mortgage outstanding, 31.2 % of homes were mortgaged and a mere 21.8 % were rented (of which just 9.1 % had pegged rents).³ Alternative forms of tenure (temporary ownership and shared ownership) are recognised in Catalonia, but the law regulating them has been challenged before the Constitutional Court.⁴

II. The housing and financial crisis in Spain

Numerous individuals and entities have benefitted from the building and subsequent purchase of housing in Spain, mainly developers, local councils and banks. Credit was readily obtainable, tax benefits were granted for the purchase of housing, speculation by private individuals was encouraged, and, what is more, supervision failed. When the housing bubble burst around 2008, it was impossible to sell all the huge amount of housing stock; the building sector collapsed and many mortgage holders lost their homes due to a fall in income. While the disaster of over-indebtedness could have been remedied by appropriate legislation on the insolvency of natural persons, this did not exist until 2015.⁵

III. The enactment of Directive 2014/17

The European legislator’s priority in enacting Directive 2014/17 is less to make freedom of movement in the area of housing loans a reality than to ensure consumer protection and financial stability. Many of the provisions that aim to redress information asymmetries and conflicts of interest, regulate the oversight of credit intermediaries and non-credit institutions and sweeten the effects of mortgage default, especially in the context of foreclosures, had already been adopted *avant la lettre* in Spain, in part thanks to benevolent ECJ case law concerning unfair clauses (Directive 93/13).⁶ However, the new Directive will oblige changes to be made

* Esther Arroyo Amayuelas, Jean Monnet Chair in EU Private Law, Universitat de Barcelona, Spain, Email: earroyo@ub.edu. This research has been undertaken in the framework of Projects DER2014-54267 and 2014 SGR 22. The most recent references to the transposition status of Directive 2014/17/EU in Spain date from March 2017. Any subsequent changes cannot be taken into account here.

1 <www.tradingeconomics.com/spain/home-ownership-rate> accessed 23 March 2017.

2 <www.tradingeconomics.com/spain/mortgage-approvals> accessed 23 March 2017.

3 <<http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>> accessed 23 March 2017.

4 Law 19/2015, 29 July (Official Gazette of the Government of Catalonia [= DOGC] no. 6927, 4 August 2015; DOGC no. 6980, 21 October 2015). The rule has been challenged in part before the Constitutional Court (Official State Gazette of Spain [= BOE] no. 134, 3 June 2016). On this topic, Sergio Nasarre-Aznar, “A Legal Perspective of the Origin and the Globalization of the Current Financial Crisis and the Resulting Reforms in Spain” in Padraic Kenna (ed.), *Contemporary Housing Issues in a Globalized World* (Ashgate 2014) 37.

5 Law 25/2015, 28 July (BOE no. 80, 29 July 2015). On the causes of the crisis in Spain, see, *inter alia*, Pablo Gutiérrez de Cabiedes and Marta Cantero Gamito, “Country Report Spain” in Hans W Micklitz and Irina Domurath, Irina (eds.), *Consumer Debt and Social Exclusion in Europe* (Ashgate 2015) 67, 69-72; Ozlem Akin *et al*, “The Real Estate and Credit Bubble: Evidence from Spain” (2014) 5 *Series Journal of the Spanish Economic Association*, 223; Héctor Simón Moreno and Miriam Anderson, “The Impact of The Mortgage Credit Directive in Spain” (2017) 8 Jean Monnet Chair EU Private Law Working Papers 1, 8-24 <www.ub.edu/jeanmonnet_dretprivateuropeu/es/publicaciones_es.html> accessed 23 March 2017.

6 For details, Simón Moreno & Anderson, “The Impact...”, especially Part III; Gutiérrez de Cabiedes & Cantero Gamito, “Country Report Spain”..., 73 ff. See the new anti-eviction measures adopted in Royal Decree-Law 5/2017, 17 March (BOE no. 66, 18 March 2017).